Supreme Court, U.S.
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No. 95-1885

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ESTATE of DIANE MONTAG, by and through MICHAEL MONTAG, the Personal Representative of the Estate, and MICHAEL MONTAG, individually,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., HONDA MOTOR COMPANY, LTD., a Japanese Corporation, and HONDA R&D CO., LTD., a Japanese Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review a decision of the United States Court of Appeals for the Tenth Circuit holding that the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208 impliedly preempt state tort law claims alleging that an automobile was defectively designed because it was not equipped with airbags and manual lap/shoulder seat belts, even though (1) any opinion by this Court would be merely advisory and would not affect the outcome of the case; (2) procedural defects in Petitioners' attempt to raise the "no-airbag" preemption issue on appeal make this an unsuitable case in which to address that issue in this Court; (3) the Tenth Circuit's decision is consistent with all decisions by other federal courts of appeals addressing this issue; and (4) contrary to Petitioners' contention, the decision below does not conflict with Congress' intent as expressed in 15 U.S.C. section 1397(k).

RULE 29.6 LISTING

American Honda Motor Co., Inc.

Calhac, Inc.
American Honda Finance Corp.
- American Honda Insurance Services, Inc.
- American Honda Receivables Corp.
- American Honda Service Contract Corporation
- Honda Canada Finance, Inc.

Honda of America Mfg., Inc.
- Benton Water Supply
- Honda of America Foundation

Bellemar Parts Industries, Inc.
Honda Power Equipment Mfg., Inc.
American Honda Foundation
Honda Canada, Inc.
Honda De Mexico S.A. De C.V.
American Honda Education Corporation
Honda Performance Development, Inc.
Honda Trading America Corp.
- Honda Trading Canada, Inc.
- Harmony Agricultural Products, Inc.

Celina Aluminum Precision Technology

Honda Motor Co., Ltd.

Japan

- Honda R&D Co., Ltd.
- Honda Engineering Co., Ltd.
- Hadsys, Inc.
- Yutaka Giken Co., Ltd.
- Honda Foundry Co., Ltd.
- Asamagiken Co., Ltd.
- Denshi Giken Co., Ltd.
- Honda Lock Mfg., Co., Ltd.
- Honda Access Sales Corp.
- Honda Motor Parts Service Co., Ltd.
- Honda Access Corp.
- Honda Parts Sales Co., Ltd.
- Honda Finance Co., Ltd.

Suzuka Circuitland Co., Ltd.
Honda Trading Corporation
Honda Leasing Corporation
Honda Sogo Tatemono Co., Ltd.
Honda Verno Shin Tokyo Co., Ltd.
Honda Racing Corporation

North America

American Honda Motor Co., Inc.
Honda North America, Inc.
Honda of America Mfg., Inc.
American Honda Finance Corporation
Indiana Precision Technology, Inc.
Honda R&D North America, Inc.
Honda Trading America Corp.
Honda Engineering North America, Inc.
Honda Canada Inc.

Europe

Honda Austria G.m.b.H.
Honda Europe N.V.
Honda Belgium N.V.
Honda Motor Europe Limited
Honda of the U.K. Manufacturing Limited
Honda France S.A.
Honda Europe Power Equipment S.A.
Honda Deutschland G.m.b.H.
Honda R&D Europe (Deutschland) G.m.b.H.
Honda Nederland B.V.
Honda International Finance B.V.
Honda Italia Industriale-S.p.A.
Honda Automobili Italia S.p.A.
Honda Automovel de Portugal S.A.
Honda Motor de Portugal, S.A.
Honda Automoviles Espana, S.A.
Montesa Honda S.A.
Honda (Suisse) S.A.

Rest of the World

P.T. Honda Prospect Engine Manufacturing
P.T. Honda Federal Inc.
Asian Honda Motor Co., Ltd.
Thai Honda Manufacturing Co., Ltd.
Honda Motor do Brasil Ltda.
Honda de Mexico, S.A. de C.V.
Honda Australia Pty., Ltd.
Honda New Zealand Limited

Honda R&D Co., Ltd.

Honda R&D Taiyo Co., Ltd.
Honda R&D North America, Inc.
Honda R&D Europe (Deutschland) G.m.b.H.
Honda R&D Europe (U.K.) Limited

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On June 22, 1990, Diane Montag ran a stop sign in Westminster, Colorado, and drove her 1988 Honda Prelude into the path of a Burlington Northern freight train. The train, consisting of six locomotives and 77 cars, weighing approximately 14 million pounds, and travelling at a speed of 34 miles per hour, plowed directly into the driver's door of the Prelude.[1] On March 30,

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[1] Petitioners state that the train "hit the left rear wheel of the 1988 Honda Prelude that Diane Montag was driving." (Pet. at 4.) Although that is correct as far as it goes, it is akin to saying that

1992, Ms. Montag died from the injuries she incurred in the crash.

Petitioners subsequently brought this product liability action. Their complaint, and later their amended complaint, alleged that the Prelude's door-latch system was defective and that the Prelude's restraint system "would not function properly when the door opened." Neither the complaint nor the amended complaint alleged that the Prelude was defective because it was equipped with an automatic lap/shoulder seat belt system rather than with a manual lap/shoulder seat belt and an airbag.

On May 28, 1992, the district court held a scheduling and status conference. As the court minutes of that conference reflect, the court ordered the parties to identify all expert witnesses, and to produce "detailed reports" of the experts' opinions, no later than December 1, 1992. The court also ordered that expert testimony at trial would be "limited to [the] extent of [the] report" and that discovery would close on March 1, 1994.

On January 7, 1993, Akio Takaoka, a witness retained by Petitioners to testify about purported defects in the design of the 1988 Prelude, submitted an expert report stating his opinions about the two defects alleged in the amended complaint. Neither he nor any other expert opined that the Prelude should have been equipped with a manual lap/shoulder seat belt and an airbag, rather than with the automatic lap/shoulder seat belt system actually installed.

Respondents took Takaoka's deposition on March 1, 1994, the last day for discovery. During his deposition, Takaoka attempted to interject a new theory of liability into the case when, for the first time, he disclosed that

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the iceberg which struck the Titanic damaged stateroom 104 of the ship. In truth, the uncontradicted record shows that the train demolished the entire driver's side of the Prelude.

he intended to express the opinion that the Prelude was defective because it was not equipped with a manual lap/shoulder seat belt and an airbag.

On May 10, 1994, Respondents filed a motion in limine to exclude testimony by Takaoka "that the 1988 Prelude was defective because Honda could have, but did not, equip the 1988 Preclude with an airbag restraint system." Specifically, the motion sought to exclude

> all evidence of and references to airbag restraint systems, including: (1) that airbag restraint systems were feasible, practical, or available in other 1988 model-year vehicles, (2) that Diane Montag's injuries would have been reduced or prevented if the 1988 Honda Prelude had been equipped with an airbag restraint system, and (3) that the 1988 Prelude is defective or unsafe because it was not equipped with an airbag restraint system.

(Pet. at 2a.) Respondents argued that such evidence was inadmissible because it (1) would "convert [Petitioners'] heretofore ordinary defect claim into a 'no-airbag' claim preempted by Federal statutes and safety regulations" and (2) would violate the court's order limiting experts' opinions to those expressed in their expert reports.

In opposing the motion in limine, Petitioners argued that their claim was not a "no-airbag" claim, but a claim that the Prelude should have been equipped with a manual lap/shoulder seat belt. They stated:

> In the context of this case, it is not the airbag that is important to Plaintiffs' design claims. The importance of the airbag is that it permits the designer/manufacturer to use a manual safety belt which would provide pelvic restraint in the event a door opens during an accident.[2]

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[2] In fact, however, an airbag was not needed in 1988 model-year vehicles to "permit" the installation of manual seat belts; rather, Federal Motor Vehicle Safety Standard 208 at that time gave each manufacturer the choice of installing *either* manual seat belts *or*

Petitioners contended that the Safety Act and Safety Standard 208 did not "preempt design defect claims," such as theirs, "involving manual safety belts with airbags."

On June 9, 1994, the district court granted Respondents' motion in limine. The court observed that "this is not a 'no-airbag' case" and that Petitioners were attempting to bring a "no-airbag" claim through the back door by having Takaoka testify as to a "no-airbag theory of defective design . . . ." (Pet. at 3a.) The court then held the back-door "no-airbag" defect theory preempted. (*Id.* at 8a.)

The court also held Takaoka's testimony on Petitioners' "no-airbag" theory inadmissible for the independent reason that Petitioners had failed to timely raise it. The court stated:

> An additional reason for precluding the Plaintiffs from attempting to show that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system is that this defect theory was not expressed by Plaintiffs' experts in their expert reports at the time of endorsement or at any time before the discovery cutoff. Not until the March 1, 1994 deposition of Mr. Takaoka did the Plaintiffs in any way introduce their theory that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system. On October 22, 1993, at the Plaintiffs' request, the discovery cutoff was extended to March 1, 1994. *In keeping with the court's requirements regarding endorsement of expert witnesses, expert reports, and discovery cutoffs, the Plaintiffs should be prohibited from introducing evidence that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system.*

(*Id.* at 9a (emphasis added).)

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passive restraints, such as airbags, in up to 75 percent of the manufacturer's vehicles. *See* p. 9 & n.5, *infra*.

At trial, Petitioners did not adduce, make an offer of proof on, or otherwise identify, any evidence about an airbag and manual seat belt restraint system. After trial, the jury found that Respondents were not liable to Petitioners and that Diane Montag's conduct was the sole cause of her accident.[3]

Petitioners appealed to the United States Court of Appeals for the Tenth Circuit. In their opening brief they identified nine issues on appeal. The only issue that dealt with evidence about airbags stated: "Did the trial court err by concluding that express pre-emption precluded introduction of the airbag/manual belt system as a safer design alternative." Petitioners did not appeal the district court's ruling that evidence on their "no-airbag" theory was inadmissible because they had failed to comply with the court's scheduling order.

In their opening brief Petitioners also ignored the facts that their expert witness had stated in deposition that he intended to testify that the Prelude was defective because it was not equipped with a restraint system using an airbag and manual lap/shoulder seat belt, and that Respondents' motion in limine was directed to that proposed testimony. Instead, Petitioners for the first time asserted that they had not intended to present evidence about a restraint system using airbags and manual lap/shoulder seat belts through their own experts; rather, they said, they at all times had planned to introduce evidence of this alternative design through Respondents' employees.

On January 22, 1996, the court of appeals affirmed the judgment of the district court. *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996). After noting that it had previously held "no-airbag" claims impliedly preempted in *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S.

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[3] Contrary to Petitioners' representation to this Court (*see* Pet. at 7), the jury did *not* "specifically [find] that Mrs. Montag's injuries were caused by her ejection from her vehicle."

1065 (1990), the court examined this Court's subsequent decisions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Freightliner Corp. v. Myrick*, —— U.S. ——, 115 S. Ct. 1483 (1995), to determine whether they mandated a different result.[4] *See* 75 F.3d at 1417. The court of appeals held they did not, stating: "[O]ur holding in *Kitts* still applies to this case. Plaintiffs were impliedly preempted from presenting airbag evidence." *Id.*

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THE DISTRICT COURT EXCLUDED EVIDENCE OF PETITIONERS' "NO-AIRBAG" THEORY OF DEFECTIVE DESIGN ON TWO GROUNDS, ONLY ONE OF WHICH WAS APPEALED, AND A DECISION BY THIS COURT ON THE PREEMPTION ISSUE THEREFORE WOULD NOT CHANGE THE OUTCOME OF THE CASE

For more than 200 years, this Court has held that it "is without power to give advisory opinions." *E.g., Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (quoting *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (Court has "frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"). In *United States v. Hastings*, 296 U.S. 188 (1935), this Court specifically held that it should not review a federal district court's decision based on two independent grounds, one of which had not been presented for review:

> A distinct question is presented where the District Court has not placed its decision solely upon the

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[4] As the court of appeals' opinion shows on its face, Petitioners' assertion that the "Tenth Circuit did not analyze the effects of the holdings of" *Cipollone* and *Myrick* "on its previous decision in *Kitts*" is incorrect. (*See* Pet. at 7.)

> invalidity or construction of the statute, but has also sustained the demurrer or granted the motion to quash the indictment upon wholly independent grounds of insufficiency. In such a case the judgment of the District Court would remain in effect and the defendant would go free of the indictment, whatever views we might express upon appeal as to the construction or validity of the statute. We could not reverse the judgment upon questions not before us. An indictment not merely attacked, but found to be invalid on grounds not open here, would be made the vehicle of an effort to obtain from this Court an expression of an abstract opinion, which might or might not fit a subsequent prosecution of the same defendant or others, but would not determine the instant case. Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly.
>
> * * * *
>
> If the judgment is independently based, and in that respect is not open to correction or reversal, we are of the opinion that this Court should not entertain the . . . appeal.

Id. at 193-94.

The same principle applies here. Here, the district court excluded evidence of Petitioners' "no-airbag" theory on two independent grounds: (1) Petitioners asserted a back-door "no-airbag" claim that was preempted, and (2) Petitioners' belated attempt to introduce a new design defect claim violated the court's scheduling order. (Pet. at 3a.) Petitioners did not appeal the court's second, independent ground for excluding "no-airbag" evidence.

In their opening brief, and in their docketing statement, in the Tenth Circuit, Petitioners identified nine issues on appeal, only one of which dealt with evidence about airbags. That appeal issue stated: "Did the trial court err by concluding that express pre-emption precluded intro-

duction of the airbag/manual belt system as a safer design alternative." Petitioners did not identify as an appeal issue the district court's ruling that evidence with respect to Petitioners' "no-airbag" theory was inadmissible because they had failed to comply with the court's pretrial order. Furthermore, no mention of, or argument on, that issue appeared in Petitioners' opening brief. Accordingly, Petitioners waived the issue, and it was not before the court of appeals. *See, e.g.*, Fed. R. App. P. 28(a)(3), (5); *Nagle v. Alspach*, 8 F.3d 141, 143 (3d Cir. 1993) ("When an issue is either not set forth in the statement of issues presented or not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal.").

As a result, in this case, as in *Hastings*, any opinion by this Court on the preemption issue would be an advisory opinion. Whatever views the Court might express on that issue, the judgment of the district court would remain in effect. Accordingly, the rule articulated in *Hastings* applies here: Because the ruling below is "independently based" on a ground that has not been appealed "and in that respect is not open to correction or reversal," this Court "should not entertain the appeal."

II. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT SQUARELY PRESENT THE "NO-AIRBAG" PREEMPTION ISSUE AND WOULD REQUIRE THE COURT TO DECIDE UNPRESERVED EVIDENTIARY ISSUES

This case is inappropriate for review for the further reason that it neither squarely nor cleanly presents the issue stated in the petition—namely, whether "no-airbag" claims are preempted. Petitioners concede that they did not even "contend that an airbag would have made a difference in this case." (Pet. at 6.) Rather, Petitioners contended that if the Prelude had been equipped with a manual lap/shoulder seat belt system mounted to the

body of the car, rather than an automatic lap/shoulder seat belt system with one end mounted to the door, "Diane Montag would not have been ejected from the vehicle and would not have sustained the injuries which ultimately led to her death." (Pet. at 4.) Therefore, as the district court noted, Petitioners agreed with the court that "this is not an airbag case."

In addition, although Petitioners suggest that the district court's ruling prevented them from attempting "to prove that there were safer, economical alternatives to the automatic safety belt system selected and designed by Honda" (Pet. at 6), the truth is that their response to the motion in limine to exclude "no-airbag" evidence identified no fewer than three alternative designs that they claimed were safer than the restraint system in the 1988 Honda Prelude and that did not include airbags. In particular, the district court's ruling did not prevent Petitioners from arguing that Respondents should have installed body-mounted manual lap/shoulder seat belts, rather than automatic lap/shoulder seat belts, in the 1988 Prelude. No mention of airbags was needed in order to make that argument because, as Petitioners concede, an airbag would have done nothing to prevent the ejection of Ms. Montag in what was a pure side-impact collision.[5]

Understandably, under these circumstances, the district court found that "[e]ven without their no-airbag theory, the Plaintiffs have viable theories of design defect and evidence of safer feasible alternatives." (*Id.* at 4a.) In short, evidence about airbags, whether used with automatic lap/shoulder seat belts or with manual lap/shoulder seat belts, was 100 percent irrelevant to Petitioners' side-

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[5] Because the Prelude in question was a 1988 model-year vehicle, Federal Motor Vehicle Safety Standard 208 permitted manual lap/shouder seat belts, as opposed to automatic seat belts or airbags, in up to 75 percent of each manufacturer's automobiles. *See* 49 C.F.R. § 571.208 (1988).

impact ejection claim. Such evidence would have done nothing to enhance Petitioners' arguments that manual seat belts were preferable to automatic seat belts. Accordingly, this case presents nothing more than an unexceptional challenge to a trial court's exclusion of evidence, and Petitioners do not present any compelling reason for granting the petition.

Moreover, the petition presents an unpreserved challenge to the district court's exclusion of evidence. *See* Fed. R. Evid. 103. In their petition, Petitioners assert that the district court's ruling precluded them from introducing into evidence documents written by, and the deposition testimony of, Ksazou Higuchi and Noboru Hashimoto, two witnesses who testified on behalf of Honda. But Petitioners never offered those materials into evidence or even identified them to the district court, either in response to the motion in limine or at trial.

As discussed above (*see supra* pp. 2-4), Respondents filed their motion in limine to exclude testimony by Petitioners' expert Akio Takaoka that they could have equipped the 1988 Prelude with a restraint system consisting of an airbag and a manual lap/shoulder seat belt and that the Prelude was defective because it was not so equipped. In opposing that motion, Petitioners did not contest Respondents' description of Takaoka's intended testimony, and Petitioners made no offer of proof about, or otherwise identified, any evidence other than Takaoka's testimony that would be prohibited by the motion. Because of Respondents' silence, therefore, the district court had no knowledge of evidence other than Takaoka's testimony that was excluded by its ruling. *See* Pet. at 2a ("Defendants ask the court to exclude all evidence of and references to airbag restraint systems . . . . The Defendants believe that the Plaintiffs intend to introduce such evidence through their expert witness, Akio Takaoka.").

Petitioners followed the same course at trial, making no attempt to introduce, and no offer of proof regarding, any evidence about restraint systems with airbags and manual lap/shoulder seat belts, including the documents and deposition testimony they now claim were improperly excluded. Specifically, although the district court's order only prohibited Petitioners "from introducing evidence that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system" (Pet. at 9a), and although Petitioners now contend that the evidence they intended to introduce would not have been directed to that issue, Petitioners (1) did not make an offer of proof of, or otherwise identify, such evidence to the district court; (2) did not argue that such evidence was admissible and necessary to rebut Respondents' testimony or to impeach or otherwise cross-examine Respondents' witnesses; (3) did not argue that such evidence was admissible and necessary because Respondents had opened the door to the issue; and (4) did not ask the court to reconsider the order in limine or to clarify its scope.

In short, Petitioners did nothing to identify the documents and deposition testimony to the district court, did nothing to introduce the documents and deposition testimony at trial, and did nothing to have the district court rule on the admissibility of the documents and deposition testimony. Accordingly, Petitioners failed to preserve the issue for appellate review. *See* Fed. R. Evid. 103 (a)(2).

These circumstances militate against granting the petition. This Court has often stated that when a case can be decided on both non-constitutional and constitutional grounds, the Court should not decide the constitutional question. *See, e.g., Harmon v. Brucker*, 355 U.S. 579, 581 (1958) (recognizing "duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case"); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (" 'It is not the habit of the Court to decide ques-

tions of a constitutional nature unless absolutely necessary to a decision of the case.'") (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)).

Finally, the true "no-airbag" preemption issue is currently pending in several appellate courts in cases that present that issue squarely, without the evidentiary and procedural complexities and imperfections that exist here. *See, e.g., Harris v. Ford Motor Co.*, No. 94-56527 (9th Cir.) (petition for interlocutory review granted on November 7, 1994; oral argument held on April 9, 1996). Because it is likely that the losing party in one or more of those cases will petition this Court for a writ of certiorari,[6] the Court will most assuredly have the opportunity to address the "no-airbag" preemption issue in an appropriate case in the near future. The Court should wait for such a case in which to address that issue.

III. CONTRARY TO PETITIONERS' CONTENTION, THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY HOLDING OF ANY OTHER CIRCUIT THAT HAS RULED ON THE "NO-AIRBAG" PREEMPTION ISSUE

Petitioners contend, incorrectly, that the court of appeals' decision in this case "directly conflicts with the

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[6] This is at least the eighth time in the last seven years in which a litigant has sought review of the "no-airbag" preemption issue by this Court. *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Nissan Motor Corp. in U.S.A. v. Superior Court*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (1989), *cert. denied*, 494 U.S. 1066 (1990); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, 487 U.S. 1236 (1988). Indeed, only six months ago this Court denied a petition for a writ of certiorari in a case that squarely and clearly presented that issue and no other. *See Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied*, —— U.S. ——, 116 S. Ct. 773 (1996).

decisions of numerous Federal circuits and state courts of last resort." (Pet. at 8 & n.3.) In truth, none of the federal court of appeals decisions cited by Petitioners addresses the "no-airbag" preemption issue at all; nor do five of the cited decisions by state courts of last resort. In ten of the cited cases, preemption was not in issue and the word "preemption" does not appear even once in the courts' opinions.[7] One of the other cases addresses only the doctrine of field preemption, which is not at issue in "no-airbag" preemption cases.[8] Ten of the cases merely confirm that compliance with Federal Motor Vehicle Safety Standards does not constitute a defense to a product liability action if none of those standards governs the specific design feature alleged by a plaintiff to be defective.[9] Indeed, six of the cases involved allegations of defects in vehicles designed and manufactured before *any* pertinent federal Safety Standard had been promulgated.[10]

Moreover, 15 of the cases involved vehicle features other than airbags, and in two instances the same courts

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[7] *See Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976); *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); *Shipp v. General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985); *Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378 (7th Cir. 1983); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978); *Volkswagen of Am., Inc. v. Young*, 321 A.2d 737 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683 (Mass. 1976).

[8] *See Arbet v. Gussarson*, 225 N.W.2d 431 (Wis. 1975).

[9] *See Knippen, supra; Dawson, supra; Stonehocker, supra; Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981), *modified*, 670 F.2d 21, *cert. denied*, 459 U.S. 880 (1982); *Shipp, supra; Schwartz, supra; Larsen, supra; General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985); *Young, supra; Arbet, supra.*

[10] *See Knippen, supra; Stonehocker, supra; Sours, supra; Schwartz, supra; Larsen, supra; Arbet, supra.*

later held "no-airbag" claims preempted.[11] As the Third Circuit stated in *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990), distinguishing its earlier decision in *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981):

> [D]espite [plaintiff's] arguments to the contrary, our decision in *Dawson* does not prohibit us from holding that [plaintiff's] common law action is impliedly pre-empted by the Safety Act and Safety Standard 208. . . . [*Dawson*] did not involve pre-emption. . . . There was no federal standard governing the particular design said to be defective in *Dawson*, and thus there was no asserted conflict between federal standards and common law liability.

Pokorny, 902 F.2d at 1122.

Petitioners similarly err in contending that the Tenth Circuit's holding in this case places it in conflict with the Eleventh Circuit. In the only "no-airbag" preemption case ever decided by the Eleventh Circuit, that court held "no-airbag" claims preempted. *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). Petitioners argue (Pet. at 11-12) that the Eleventh Circuit reversed course in *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds, Freightliner Corp. v. Myrick, supra*, and "reaffirmed" that reversed course in *Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139 (11th Cir. 1996), but that argument is flawed in several respects.

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[11] *Compare, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) ("no-airbag" claims preempted), *with Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (compliance with federal safety standards was not complete defense to claim that vehicle was defective because of noncontinuous body frame); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996) ("no-airbag" claims preempted), *and Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) (same), *with Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978)

First, *Myrick* involved antilock brakes in trucks, not airbags in cars, and the preemptive effect of Federal Motor Vehicle Safety Standard 208 was neither before the Eleventh Circuit nor discussed by it. That is of no minor moment, because the difference between truck antilock brakes and Federal Motor Vehicle Safety Standard 121, on the one hand, and airbags and Federal Motor Vehicle Safety Standard 208, on the other, is considerable. Most importantly, whereas the Department of Transportation and the Department of Justice explcitly stated that claims based on the absence of truck antilock brakes were not intended to be preempted by Safety Standard 121, the same agencies have three times explicitly stated that "no-airbag" claims were intended to be preempted by Safety Standard 208. *Compare* Brief for the United States as *Amicus Curiae* at 29-30, *Freightliner Corp. v. Myrick,* No. 94-286 (U.S. Dec. 1994) (truck antilock brake claims not preempted by Safety Standard 121), with *id.* at 28-29 ("no-airbag" claims preempted by Safety Standard 208); Brief for United States as *Amicus Curiae* at 13-14, *Wood v. General Motors Corp.,* 494 U.S. 1065 (1990) (No. 89-46) (same); Brief of the United States as *Amicus Curiae* at 32-35, *Ritt v. General Motors Corp.,* No. 88-1822 (7th Cir. 1989) (same).

Second, although it affirmed the Eleventh Circuit's judgment regarding antilock brakes in *Myrick,* this Court did so because there was "simply no federal standard for a private party to comply with. Nothing in the Safety Act or its regulations currently regulates the use of [antilock brake] devices. . . . In the absence of a promulgated safety standard, the Act simply fails to address the need for [antilock brakes] at all." —— U.S. at ——, 115 S. Ct. at 1488. This Court flatly rejected as "without merit" the portion of the Eleventh Circuit's opinion holding that, because of this Court's decision in *Cipollone,*

(compliance with federal safety standards was not complete defense to claim that rear-seat lap safety belt was defectively designed).

"implied preemption cannot exist where Congress has chosen to include an express pre-emption clause in a statute." —— U.S. at ——, 115 S. Ct. at 1487. Because it was only that erroneous portion of the Eleventh Circuit's *Myrick* opinion which could be said to support a broad conclusion that no common law claim of any kind could be impliedly preempted by any Federal Motor Vehicle Safety Standard, and because this Court held that portion of the opinion to be erroneous, the Eleventh Circuit's *Myrick* opinion holding truck antilock brake claims not preempted cannot now credibly be said to have overruled the same court's *Taylor* opinion holding "no-airbag" claims preempted.

Third, although Petitioners argue that the Eleventh Circuit in *Doyle* "reaffirmed" its holding in *Myrick* and thereby somehow found "no-airbag" claims not preempted, it did no such thing. The claimed design defect in *Doyle* was not an absence of airbags, but "the absence of a lap belt." *Doyle*, 81 F.3d at 141. Moreover, the court of appeals in *Doyle* was not reviewing a preemption decision, but a district court ruling "[f]inding plaintiffs' claims precluded *under Georgia law*," *id.* (emphasis added), and the court of appeals certified to the Supreme Court of Georgia that "unanswered question of Georgia law that is determinative of this appeal," *id.* at 140. Thus, the court of appeals could not have "reaffirmed" its *Myrick* preemption holding in *Doyle*, because that issue was not before the court in *Doyle*.

To the extent that the Eleventh Circuit in *Doyle* indicated any view regarding preemption of "no-airbag" claims, it indicated that *Taylor* had correctly held such claims preempted because of the conflict between such claims and applicable federal law. The court stated:

> While *Taylor* endorses the Georgia Court's ruling in [*Honda Motor Co. v.*] *Kimbrel*, [189 Ga. App. 414, 376 S.E.2d 379 (1988), that "no-airbag" claims cannot be maintained under Georgia law],

> it makes clear that preemption exists only when there is a conflict between federal and state law, *as there would have been had Kimbrel been decided otherwise.*

Doyle, 81 F.3d at 142 (emphasis added).

Thus, none of the federal court of appeals decisions cited by Petitioners held "no-airbag" claims not preempted. The court of appeals' decision in this case holding "no-airbag" claims preempted is in fact consistent with every other federal court of appeals decision addressing that issue. *See, e.g., Pokorny*, 902 F.2d 1116; *Taylor*, 875 F.2d 816; *Kitts*, 875 F.2d 787; *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). Each of those decisions explicitly held "no-airbag" claims preempted.

Petitioners' description of recent decisions by state courts of last resort is also incorrect. Petitioners erroneously assert that, following this Court's vacatur and remand in *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Ariz. 1994), *vacated and remanded*, —— U.S. ——, 115 S. Ct. 1819 (1995), the Arizona Supreme Court "announced its decision on rehearing finding no preemption of state tort law claims by the Safety Act. *Hernandez-Gomez v.* [*Leonardo*] 917 P.2d 238 (Ariz. 1996)." (Pet at 13.) In fact, the Arizona Supreme Court merely found no preemption of a *Doyle*-type claim—namely, that a Volkswagen automobile was defective because it did not have a lap belt. The court explicitly recognized that other common law claims are preempted by the Safety Act. The court stated:

> It is clear to us, however, that at the very least *Myrick* stands for the proposition that common-law claims that expressly and directly conflict with the text of the [federal] standard are preempted by the preemption clause; common-law claims that do not

> expressly conflict may still be preempted if they violate one of the articulated rules for implied preemption . . . .

Hernandez-Gomez, 917 P.2d at 243. "No-airbag" claims fit squarely within the category the court described as claims that "are preempted."

Petitioners' description of "no-airbag" preemption decisions by state courts of last resort is also incomplete, because it does not include a decision issued by the Mississippi Supreme Court on May 23, 1996, two days after the petition in this case was filed. In *Cooper v. General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272362 (Miss. May 23, 1996), the Mississippi Supreme Court, like all of the federal courts of appeals that have addressed the issue, held "no-airbag" claims preempted by federal law.

Because the federal courts of appeals that have addressed the issue have unanimously held "no-airbag" claims preempted, and because more than 140 other courts have held such claims preempted, Petitioners can neither correctly assert that the decision below conflicts with a decision of another United States Court of Appeals nor justifiably assert that the Tenth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ." Rule 10(a), Rules of the Supreme Court of the United States. As shown in sections I and II above, resolution by this Court of the conflict between the vast majority of courts that have held "no-airbag" claims preempted and the small number of state courts [12] that have held to the contrary should await a case that more appropriately presents the issue for consideration.

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[12] *See, e.g., Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied*, —— U.S. ——, 116 S. Ct. 773 (1996); *Loulos v. Ford Motor Co.*, 882 S.W.2d 149 (Mo.App. 1994).

IV. CONTRARY TO PETITIONERS' CONTENTION, THE DECISION BELOW DOES NOT CONFLICT WITH CONGRESS' INTENT AS EXPRESSED IN 15 U.S.C. SECTION 1397(k)

Petitioners characterize 15 U.S.C. section 1397(k) as an "express anti-preemption provision" and a "savings clause" that "unambiguously preserves all common law claims." (Pet. at 18-19.) That characterization is wrong in every respect, and it does not provide an appropriate basis for review by this Court.

Section 1397(k) provides, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). This clause establishes that compliance with Federal Motor Vehicle Safety Standards does not constitute an affirmative defense to common law claims.

The language of section 1397(k) demonstrates that it is not an "express anti-preemption provision" and in fact does not address preemption at all. First, the true preemption provision, 15 U.S.C. section 1392(d), is explicitly entitled "Supremacy of federal standards," whereas section 1397(k) has a title that makes no reference to the Supremacy Clause or to preemption. Section 1397(k) is simply entitled "Continuation of common law liability."

Second, as the First Circuit correctly recognized in *Wood*, 865 F.2d at 401 n.8, 417-18, the language of section 1397(k) definitively is *not* the language commonly employed by Congress in saving clauses intended to restrict the scope of preemption. Instead, the language of section 1397(k) is language that refers to and negates compliance with a government standard as an affirmative common law defense.

This narrow language, referring as it does to "[c]ompliance with any Federal motor vehicle safety standard," differs dramatically from the encompassing saving lan-

guage that Congress used both in the Safety Act itself and in numerous other statutes when it intended to restrict the scope of preemption. Thus, for example, in the true express preemption provision of the Safety Act, section 1392(d), Congress explicitly incorporated two saving-clause exceptions to the preemptive first sentence of that provision. Each of the two saving-clause sentences begins with the clear, unambiguous, and traditional anti-preemption saving language, "Nothing in this section shall be construed." The two saving clauses in the preemption provision state:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is not identical to a Federal safety [standard]. *Nothing in this section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d) (emphasis added). The saving clauses in virtually every other case decided by this Court in this century have used similar encompassing language, not the narrow, affirmative-defense-oriented "compliance with" language of section 1397(k).[13]

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[13] *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, —— U.S. ——, 114 S. Ct. 517 (1993) (interpreting saving clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (interpreting saving clause of Federal Aviation Act of 1958, 49 U.S.C. § 1506, which states, "Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."); *Cipollone*, 505 U.S. at 518 (referring to saving

Moreover, in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), this Court reaffirmed the established principle that, in interpreting an express preemption provision, "[e]vidence of pre-emptive purpose is sought in the text *and structure* of the statute at issue." 507 U.S. at 664 (emphasis added). Here, section 1397(k) appears five full sections after the true preemption provision—namely, the provision whose title explicitly refers to the "Supremacy of federal standards." That structural fact alone indicates that section 1397(k) was not intended to address preemption. That structural fact is reinforced by the additional structural fact that section 1392(d) contains two, and only two, explicit saving clauses, each of which uses traditional saving-clause language. This additional structural fact suggests that, if Congress had intended section 1397(k) to constitute a third—and the most sweeping—exception to the preemption provision in the first sentence of section 1392(d), Congress would have included the language of section 1397(k) in its logical place, adjacent to the other two explicitly stated saving clauses in the provision labeled "Supremacy of federal standards." Accordingly, the statutory structure of the Safety Act, like its text, shows that section 1397(k) was never intended to address preemption and was never intended to create a sweeping exception to section 1392(d).

Even if section 1397(k) were somehow to be construed as a saving clause that limited preemption, it would not prevent the conflict preemption that exists here. For almost a century, this Court has narrowly interpreted general saving clauses not to prevent conflict preemption, but only to preclude preemption of an entire field; that is, without such a clause,

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clause of Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406(c), which states, "Nothing in this Act shall relieve any person from liability, under common law or under State statutory law, to any other person.").

> it might have been claimed that Congress having entered the field, the whole subject of liability . . . had been withdrawn from the jurisdiction of state courts, so [the saving clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328 (1981). *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907).

In *Abilene Cotton*, for example, the Court held that the Interstate Commerce Act precluded a common law action for damages for unjust and discriminatory rates, notwithstanding the Act's broad saving clause, which stated:

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

204 U.S. at 446-47. Recognizing the tension between the saving language and the broader purposes of the federal regulatory scheme, the Court held that the saving clause "cannot in reason, be construed as continuing . . . a common law right" inconsistent with the underlying federal aims. *Id.* at 446. *Accord Ouellette*, 479 U.S. at 492-94; *Kalo Brick*, 450 U.S. at 331; *T.I.M.E.*, 359 U.S. at 473-74; *Puritan Coal Mining*, 237 U.S. at 129-30.

Thus, even if section 1397(k) were construed as containing anti-preemption saving language, rather than the affirmative-defense "compliance with" language that it actually contains, it would properly be interpreted to preclude field preemption, not to preclude the narrow form

of preemption that arises when the state standard in issue conflicts with the purposes and policies of the federal regulation or statute in issue.

An interpretation of section 1397(k) that precludes broad field preemption yet permits narrow conflict preemption is consistent with the legislative history of the Safety Act. The Senate Report stated: "[T]he Federal minimum Safety Standards *need not* be interpreted as restricting State common law standards of care. Compliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added). If section 1397(k) prevented preemption of common law claims, the words "not necessarily" and "need not" would be not merely superfluous, but internally inconsistent. If, on the other hand, section 1397(k) addresses only compliance with affirmative defenses, or precludes only field preemption and not conflict preemption, the quoted legislative history is sensible, precise, and consistent with decades of Supreme Court precedents. In short, compliance with a federal Safety Standard does not *necessarily* prevent application of a state standard, but it does so in instances in which the state standard would impede the federal purposes.

CONCLUSION

For the foregoing reasons, review by this Court is neither necessary nor appropriate. Respondents respectfully request that the petition be denied.

Respectfully submitted,

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